(2)

No. 00-660

In the Supreme Court of the United States

FLORIDA SUGAR MARKETING AND TERMINAL ASSOCIATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Export Clause of the Constitution prohibits application of the Harbor Maintenance Tax, 26 U.S.C. 4461, to interstate shipments of goods.

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1 Ronald D. Rotunda & John E. Nowak, *Treaties on Constitutional Law* (2d ed. 1992) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 220 F.3d 1331. The opinion of the Court of International Trade (Pet. App. 26-29) is reported at 40 F. Supp. 2d 479.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2000. The petition for a writ of certiorari was filed on October 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Water Resources Development Act, Pub. L. No. 99-662, 100 Stat. 4082, was enacted in 1986 to provide comprehensive improvements in the Nation's ports and harbors. To fund such improvements, Title XIV of the Act (§ 1402(a), 100 Stat. 4266) established the Harbor Maintenance Tax, 26 U.S.C. 4461 *et seq.*, which imposes an *ad valorem* tax on the use of ports by importers, exporters, domestic shippers, and passenger liners. The Harbor Maintenance Tax is imposed on "any port use" by an "importer," "exporter," or "shipper" on the basis of the value of the "commercial cargo" shipped through the port. 26 U.S.C. 4461(a)-(c). "Commercial cargo" is defined as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire." 26 U.S.C. 4462(a)(3)(A). Revenue from the tax is placed in the Harbor Maintenance Trust Fund, from which amounts are withdrawn to pay for improvements in ports and harbors. 26 U.S.C. 9505. In *United States* v. *United States Shoe Corporation*, 523 U.S. 360, 363, 370 (1998), this Court held that, because the Harbor Maintenance Tax does not qualify as a "user fee," it may not constitutionally be applied to exported goods under the Export Clause of the Constitution.

2. Petitioner paid the Harbor Maintenance Tax owed on interstate shipments of sugar from ports of one State to ports of other States. Petitioner then brought this suit in the Court of International Trade, contending that application of the Harbor Maintenance Tax to interstate shipments of goods violates the Export Clause of the Constitution. Pet. App. 26-27.

The Court of International Trade rejected petitioner's contention. Pet. App. 26-29. The court con-

cluded that the precedents of this Court clearly establish that the Export Clause—which prohibits taxes upon exports of goods to foreign countries—does not prohibit imposition of federal taxes on interstate shipments of goods. *Id.* at 28-29 (citing, *e.g.*, *Dooley* v. *United States*, 183 U.S. 151 (1901)).

3. The court of appeals affirmed. Pet. App. 1-25. The court concluded that the text of the Export Clause, as well as the records and debates from the Constitutional Convention, demonstrate that the Framers intended that Clause to prohibit only taxes upon export shipments of goods to foreign countries. *Id.* at 5-14. The court observed that several decisions of this Court have concluded that the term "exports" applies only to shipments to foreign countries (*id.* at 15-19) and that the "prohibition [of the Export Clause] relates only to exportation to foreign countries * * * ." *Id.* at 21 (quoting *United States* v. *Hvoslef*, 237 U.S. 1, 13 (1915)). The court of appeals concluded that the reasoning set forth in these decisions reflects "consistent guidance from the Supreme Court indicating that the Export Clause cannot logically be interpreted to ban federal taxes on interstate shipments from one port to another." Pet. App. 25.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The Federal Circuit properly concluded that the Export Clause does not prohibit assessment of the Harbor Maintenance Tax on interstate shipments of goods. The Export Clause of the Constitution constrains the federal taxing power by providing that "[n]o

Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5. The longstanding precedents of this Court have consistently concluded that, while the Export Clause restricts federal taxation of exports to foreign countries, it does not restrict federal taxation of interstate shipments of goods. For example, in *Dooley* v. *United States*, 183 U.S. 151, 154 (1901), the Court specifically concluded that the Export Clause applies only to taxes imposed on foreign commerce. That case involved a federal statute that imposed duties on merchandise shipped between New York and Puerto Rico. *Id.* at 153. The statute was "attacked upon the ground of its violation of that clause of the Constitution (art. 1, § 9) declaring that 'no tax or duty shall be laid on articles exported from any state [the Export Clause].'" *Ibid.* The Court rejected that claim because "the word 'export' should be * * * applied only to goods exported to a foreign country." *Id.* at 154. Because Puerto Rico was not a foreign country, the Court found "it impossible to say that goods carried from New York to Porto Rico can be considered as 'exported' from New York within the meaning of [the Export Clause] of the Constitution." *Id.* at 154-155.

Petitioner errs in asserting (Pet. 5 n.2) that this clear holding of the Court in *Dooley* was merely dicta. There was, as this Court subsequently noted, an additional ground upon which the tax in *Dooley* could have been, and was, sustained. The tax in *Dooley* was valid not only because it did not violate the Export Clause but also because it was "a valid exercise of the power of Congress to enact laws for the government of a dependency acquired by treaty." *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 670 n.5 (1945). Although the Court's holding under the Export Clause in *Dooley* was

thus "an alternative ground" for decision in that case (*Hooven & Allison Co.* v. *Evatt*, 324 U.S. at 670 n.5), that does not make that holding dicta. "[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949). Instead, each of the alternative holdings constitutes valid, binding precedent of the Court. *Ibid.* See also *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 346 n.4 (1986); *Massachusetts* v. *United States*, 333 U.S. 611, 623 (1948).

Moreover, in cases following *Dooley*, the Court has consistently repeated the conclusion that the Export Clause has no application to federal taxes imposed on interstate shipments of goods. For example, in *United States* v. *Hvoslef*, 237 U.S. 1 (1915), the Court cited *Dooley* and *Woodruff* v. *Parham*, 75 U.S. (8 Wall.) 123 (1868), as support for the conclusion that the Export Clause "prohibition relates only to exportation to foreign countries." 237 U.S. at 13. Similarly, in *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 434 n.44 (1946) (citation omitted), the Court reiterated that the Export Clause was "held applicable only to foreign commerce in *Dooley* v. *United States*." See also *United States* v. *International Business Machines Corp.*, 517 U.S. 843, 859 (1996) (the "Export Clause * * * specifically prohibits Congress from regulating *international* commerce through export taxes") (emphasis added).

The conclusion that the Court has thus consistently drawn as to the proper scope of the Export Clause conforms to the traditional understanding that articles are deemed "exports" only after they enter the "export stream"—that is, "during transportation of the goods from the United States to a foreign country." 1 Ronald

D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 5.9, at 477 (2d ed. 1992). See, *e.g.*, *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62 (1974) (the Import-Export Clause applies only once the article enters the stream of exportation); *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69, 83 (1946) ("The means of shipment are unimportant so long as the certainty of the foreign destination is plain.").

2. Petitioner's effort to overturn this settled precedent is based primarily upon its contention that, in the eighteenth century, the term "export" could have been understood to include both foreign and interstate shipments. Pet. 7-9. As the Federal Circuit properly noted in rejecting petitioner's contention, however, the relevant historical usage is the usage employed by the Framers—and the best evidence of that usage is in the records and debates of the Constitutional Convention, not "in common, lay" documents of the type on which petitioner seeks to rely. Pet. App. 8. The court of appeals carefully reviewed the Convention records and debates, which reveal "that the delegates to the Constitutional convention were referring only to foreign exports" in the "debates about the Export Clause." *Id.* at 10. The records of the Constitutional Convention establish that the Export Clause was the result of a compromise between the Northern and Southern delegates that concerned "shipments in foreign commerce alone." *Id.* at 13. See also *Fairbank* v. *United States*, 181 U.S. 283, 292 (1901). The debates reflect the same conclusion reached by this Court in *Dooley* and by the court of appeals in the present case: "that the Framers were consistently using 'export' in a foreign commerce context when they drafted and debated the Export Clause." Pet. App. 14.

3. Petitioner errs in suggesting (Pet. 6) that the dissent in *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 609 (1990) (Thomas, J., dissenting), supports the contention that the Export Clause prohibits taxes upon interstate shipments. The dissent in *Camps Newfound* does not discuss or analyze the Export Clause. Instead, the dissent in that case suggests that the Import-Export Clause*—which has been interpreted by the Court to apply only to state taxes on shipments to and from foreign countries—could be read broadly to include a prohibition upon state taxes on interstate as well as foreign shipments. *Id.* at 636-637.

The reservations expressed by the dissent in the *Camps Newfound* case were not, of course, adopted by the Court in that case or in any subsequent decision. Moreover, although the Import-Export Clause and the Export Clause are often given consistent interpretations, this Court recently stated that "[i]t is simply no longer true that the Court perceives no substantive difference between the two Clauses." *United States* v. *International Business Machines Corp.*, 517 U.S. at 859. And, the opinion of the Court delivered by Justice Thomas in the *International Business Machines* case expresses the same understanding of the Export Clause established in *Dooley*—that it "prohibits Congress from regulating *international* commerce through export taxes." *Ibid.* (emphasis added).

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* U.S. Const. Art. I, § 10, Cl. 2 provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports * * * ."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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